B690
Supreme Court, U.S.
JAN 21 2010
OFFICE OF THE CLERK

(17) (16)

Nos. 08-1498 and 09-89

In the Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,
PETITIONERS
v.
HUMANITARIAN LAW PROJECT, ET AL.

HUMANITARIAN LAW PROJECT, ET AL., CROSS-PETITIONERS
v.
ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR HUMANITARIAN LAW PROJECT, ET AL.

DAVID D. COLE
c/o Georgetown Univ. Law Center
600 New Jersey Ave. NW
Washington, DC 20001
cole@law.georgetown.edu
(202) 662-9078
Counsel of Record for
Respondents/Cross-Petitioners
Humanitarian Law Project et al.

(additional counsel on following page)

BOTH 5C6MQ6

SHAYANA KADIDAL
JULES LOBEL
JOSHUA M. ROSENTHAL
Center for Constitutional Rights
666 Broadway, 7th floor
New York, NY 10012
(212) 614-6438

RICHARD G. TARANTO
Farr & Taranto
1150 18th Street, NW
Washington, DC 20036
(202) 775-0184

CLIFFORD Y. CHEN
Watkins, Bradley & Chen LLP
228 Park Avenue South
#14905
New York, NY 10003
(212) 937-4281

CAROL SOBEL
429 Santa Monica Blvd., Suite 550
Santa Monica, CA 90401
(310) 393-3055

PAUL HOFFMAN
Schonbrun, De Simone, Seplow, Harris and Hoffman LLP
723 Ocean Front Walk
Venice, CA 90291
(310) 396-0731

VISUVANATHAN RUDRAKUMARAN
875 Ave. of the Americas
New York, NY 10001
(212) 290-2925

Counsel for Respondents in 08-1498 and Cross-Petitioners in 09-89, Humanitarian Law Project et al.

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. THE CHALLENGED PROVISIONS ARE IMPERMISSIBLY VAGUE 4

A. Training 7

B. Expert Advice or Assistance 9

C. Service 12

D. Personnel 15

E. The Provisions Are Invalid on Their Face 18

II. THE CHALLENGED PROVISIONS VIOLATE THE FIRST AMENDMENT BECAUSE THEY IMPOSE CONTENT BASED PROHIBITIONS ON SPEECH BASED ON ITS COMMUNICATIVE IMPACT 20

A. *O'Brien* Does Not Apply to Provisions That Criminalize Pure Speech Based on Its Communicative Impact 20

B. *O'Brien* Does Not Apply Because the Challenged Provisions Are Not Content-Neutral 27

C. The Provisions Cannot Survive Even Intermediate Scrutiny 30

III. THE CHALLENGED PROVISIONS VIOLATE PLAINTIFFS' RIGHTS OF ASSOCIATION 36

IV. THE COURT CAN AVOID THE CONSTITUTIONAL QUESTIONS PRESENTED BY ADOPTING A SPECIFIC INTENT REQUIREMENT.....39

V. GRANTING PLAINTIFFS RELIEF WILL NOT IMPEDE THE GOVERNMENT'S LEGITIMATE INTERESTS IN NATIONAL SECURITY.....42

CONCLUSION.....44

TABLE OF AUTHORITIES

CASES

Ashcroft v. Free Speech Coalition,
535 U.S. 234 (2002).....31

Bartnicki v. Vopper,
532 U.S. 514 (2001).....31

Boos v. Barry,
485 U.S. 312 (1988).....29

Bose Corp. v. Consumers Union,
466 U.S. 485 (1984).....33

Cantwell v. Connecticut,
310 U.S.296 (1940)..... 26-27

Citizens United v. FEC, No. 08-205,
(U.S. Jan. 21, 2010).....20, 22, 40, 44

Cohen v. California,
403 U.S. 15 (1971)..... 22-24, 26

Cox v. Louisiana,
379 U.S. 536 (1965).....19, 26, 31, 43

Cox Broadcasting Corp. v. Cohn,
420 U.S. 469 (1975).....22

De Jonge v. Oregon,
299 U.S. 353 (1937).....27, 31, 36-37, 39, 43

DKT Mem'l. Fund Ltd. v. Agency for Int'l Dev.
887 F.2d 275 (D.C. Cir. 1989).....37

Edward J. DeBartolo Corp. v. *Florida Gulf Coast Bldg. & Constr. Trades Council,*
485 U.S. 568 (1988).....40

Edwards v. South Carolina,
372 U.S. 229 (1963)).....26

Federal Election Commission v. Wisconsin Right to Life, 551 US 449 (2007) 31

Fisher v. City of Berkeley,
475 U.S. 260 (1986).....16

Gentile v. State Bar of Nevada,
501 U.S. 1030 (1991).....7

Greater New Orleans Broadcasting Ass'n, Inc., v. United States, 527 U.S. 173 (1999).....:.....32

Gregory v. City of Chicago,
394 U.S. 111 (1969).....26, 31

Healey v. Leavitt,
485 F.3d 63 (2d Cir. 2007) 9

Herndon v. Lowery,
301 U.S. 242 (1937).....39

Hill v. Colorado,
530 U.S. 703 (2000)..... 29-30

Humanitarian Law Project v. U.S. Dep't of Justice, 352 F.3d 382 (9th Cir. 2003), *vacated and remanded in light of intervening legislation by* 393 F.3d 902 (9th Cir. 2004) (en banc).....41

Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993).....28

Lamont v. Postmaster General, 381 U.S. 301 (1965).....37

NAACP v. Button, 371 U.S. 415 (1963).....37, 39

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).....27, 39

Pierce v. Underwood, 487 U.S. 552 (1988).....8, 10

Police Dept of Chicago v. Mosley, 408 U.S. 92 (1972).....2

Roberts v. U.S. Jaycees, 468 U.S. 609 (1984).....38

Rosenberger v. Rector & Visitors of University of Virginia, 515 U.S. 819 (1995).....28

Rumsfeld v. FAIR, 547 U.S. 47 (2006).....6

Scales v. United States, 367 U.S. 203 (1961).....35, 39, 41-42

Smith v. Goguen,
415 U.S. 566 (1974) 5

Street v. New York,
394 U.S. 576 (1969) 22, 24

Taylor v. Mississippi,
319 U.S. 583 (1943) 31

Texas v. Johnson,
491 U.S. 397 (1989) 21, 23, 30

Thomas v. Collins,
323 U.S. 516 (1945) 20

Turner Broadcasting Systems, Inc. v. FCC,
512 US 622 (1994) 32

United States v. Albertini,
472 U.S. 675 (1985) 25

United States v. Container Corp. of Am.,
393 U.S. 333 (1969) 16

United States v. Goba,
220 F. Supp. 2d 182, 194 (W.D.N.Y. 2002) 18

United States v. Lindh,
212 F. Supp. 2d 541 (E.D. Va. 2002) 18

United States v. O'Brien,
391 U.S. 367 (1968) 2, 20-22, 24-28, 30-31

United States v. Taleb-Jedi,
566 F. Supp. 2d 157 (E.D.N.Y. 2008) 18

United States v. Warsame,
537 F. Supp. 2d 1005 (D. Minn. 2008) 18

United States v. Williams,
128 S. Ct. 1830 (2008).....18, 26, 41

United States v. Wivell,
893 F.2d 156 (8th Cir. 1990).....9

United States v. National Treasury Employees Union, 513 U.S. 454 (1995).....32

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,
455 U.S. 489 (1982).....5, 19

BRIEFS

U.S. Br., *Dennis v. United States*,
341 U.S. 494 (1951), (No. 336), 1950 WL 78653....37

U.S. Br. on Reargument,
Scales v. United States, 367 U.S. 203 (1961)
(No. 1), 1959 WL 101542 35

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. I.....*passim*

U.S. CONST. amend. V.....5, 42

STATUTES

Bipartisan Campaign Reform Act (BCRA),
2 U.S.C. § 431,.....31

Sherman Act,
15 U.S.C. § 1..... 15-16

18 U.S.C. §175b(d)(2)(G).....17

18 U.S.C. § 951..... 17-18

18 U.S.C. § 2339A 42

18 U.S.C. § 2339B .....*passim*

18 U.S.C. § 2339B(h) 17

18 U.S.C. § 2339B(i) 12, 33

18 U.S.C. § 2339C 42

Equal Access to Justice Act (EAJA),
28 U.S.C. § 2412,.....8

Anti-Terrorism and Effective Death Penalty Act
of 1996 (AEDPA), Pub. L. No. 104-132,
110 Stat. 1214 (April 24, 1996),
§ 301(a)(7).....33

LEGISLATIVE MATERIALS

H.R. Rep. No. 104-383 (1995) 33

FEDERAL RULES AND REGULATIONS

31 C.F.R. § 597.505(a).....19

Fed. R. Evid. 702.....10

TREATISE

Philip Areeda & Herbert Hovenkamp,
Antitrust Law (2d ed. 2003).....16

OTHER AUTHORITIES

John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*,
88 Harv. L. Rev. 1482 (1975) 23

Elena Kagan, *When A Speech Code Is a Speech Code: The Stanford Policy and the Theory of Incidental Restraints*,
29 U.C. Davis L. Rev. 957 (1996) 24

Eugene Volokh, *Speech as Conduct: Generally Applicable Law, Illegal Courses of Conduct, 'Situation-Altering Utterances,' and the Uncharted Zones*,
90 Corn. L. Rev. 1277 (2005) 23-24, 27

INTRODUCTION AND SUMMARY OF ARGUMENT

As applied here, the four challenged provisions in 18 U.S.C. § 2339B directly prohibit pure political speech, facially discriminate on the basis of content, and hinge severe criminal penalties on such indeterminate distinctions as that between "general" and "specialized" knowledge—classic terms of degree that force plaintiffs to guess as to whether their speech is protected or proscribed. The government concedes that the provisions make it a crime to advocate lawful, peaceable activities in concert with a proscribed group, yet fail to cite a single decision upholding the imposition of such penalties on pure speech.

The government's central argument is that because the statute *also* penalizes conduct, it may be applied to criminalize plaintiffs' pure speech—even where the only asserted or conceivable basis for *this application* (the question in an as-applied challenge) is the communicative impact of the speech or of the association involved in coordinating the speech. That is not the law. The government cannot penalize otherwise lawful pure speech for its content simply because it also penalizes conduct.

1. All four challenged provisions ("training," "expert advice or assistance," "service," and "personnel") are impermissibly vague. The government, in arguing otherwise, declines even to apply the heightened vagueness standard applicable where a criminal statute implicates First Amendment freedoms. It identifies no other statute using the terms at issue to divide criminal from non-criminal activities involving speech. And the government's attempts to explain the challenged provisions only further confuse mat-

ters. Indeed, the provisions are so vague that they render their use in the statute facially overbroad.

2. The government's contention that the provisions are a content-neutral conduct regulation that only "incidentally" criminalizes expression, warranting (and satisfying) intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367 (1968), fails for multiple reasons.

First, as applied here, the challenged provisions penalize *speech*, not *conduct*, and do so based on its communicative impact. *O'Brien* applies only to laws regulating the "nonspeech element" of expressive conduct, 391 U.S. at 376, and serving interests "unrelated to the suppression of free expression," *id.* at 377. As applied to plaintiffs' proposed pure speech, there is literally no "nonspeech element" to regulate. The only way that plaintiffs' speech could conceivably implicate the government's asserted interests in denying aid or legitimacy to proscribed organizations is by virtue of what it communicates. *O'Brien* no more applies here than it would if a law criminalizing all "conduct that interfered with the draft" were applied to an anti-draft op-ed essay.

Second, the provisions discriminate on the basis of content, and *O'Brien* is reserved for content-neutral laws. The statute permits unlimited provision of religious materials, thereby favoring religious over all other expression. *O'Brien* is therefore inapplicable here, as it would be to a ban on destroying draft cards except for religious reasons. *See Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 101-02 (1972). And the provisions favor instruction and advice based on "general knowledge" over speech whose content imparts a "specific skill" or is derived from

scientific, technical, or other specialized knowledge—explicit content-based distinctions.

Third, the challenged provisions fail even under the *O'Brien* standard. The government's interest, in applying the provisions at issue to plaintiffs' speech, is not "unrelated to the suppression of expression." And the provisions penalize much more speech than necessary; the government has offered no valid reason for criminalizing speech that advocates only lawful, nonviolent activity (while at the same time tolerating unlimited donation of religious materials or "independent advocacy" urging violent terrorism).

3. The challenged provisions also impair plaintiffs' right of association. The provisions criminalize speech based on the political identity of its recipient or beneficiary. The very same speech, association, and coordination are allowed if a non-designated organization is involved, even if that organization engages in widespread terrorism. It is not enough that plaintiffs are free merely to *join* a designated organization. A law that criminalized any advocacy communicated in coordination with Greenpeace International, a foreign organization that engages in legal as well as illegal conduct, would impair associational freedoms even if it allowed nominal membership in Greenpeace. At a minimum, the right of association must encompass the right to speak to and in conjunction with groups one has a right to join.

4. The Court may avoid definitively pronouncing on all of the foregoing defects by reading Section 2339B to require specific intent to further the terrorist activities of the designated terrorist organization when speech is at issue. Congress expressly directed the courts to interpret Section

2339B to avoid First Amendment infringement. And this Court followed a similar course in construing the Smith Act decades ago, involving an organization (the Communist Party) likewise found to engage in international terrorism. A specific intent requirement would resolve this particular case, because plaintiffs undisputedly seek only to further the LTTE's or PKK's lawful activities. Whether such a construction would "save" the statute from every conceivable future constitutional challenge is irrelevant; the constitutional avoidance principle is guided by "avoidance," not "saving."

5. Protecting plaintiffs' right to engage in lawful, nonviolent speech—on statutory or constitutional grounds—will not remotely threaten the government's compelling interests in fighting terrorism. Section 2339B would remain fully applicable to all nonspeech conduct, and would be inapplicable only to peaceable speech that is not intended to further the illegal, much less terrorist, ends of a group. The government has not come close to supporting its broad argument that practical security concerns require that the challenged provisions be upheld as applied to the particular speech at issue here. Indeed, it has not cited a single prosecution under the statute for speech remotely like plaintiffs'.

ARGUMENT

I. THE CHALLENGED PROVISIONS ARE IMPERMISSIBLY VAGUE

The challenged provisions force plaintiffs to guess whether their proposed political advocacy, human rights training, and peacemaking assistance is derived from or imparts "general" or "specialized"

knowledge, is done "for the benefit of" the recipient group or for other purposes, or is conducted independently or in some unspecified coordinated fashion. If they guess wrong, they face a felony terrorist conviction and up to fifteen years in prison. Where, as here, such open-ended and indeterminate standards mark the difference between permitted speech and a serious crime, the First and Fifth Amendments require far greater precision than the statute provides.

The government first argues that the provisions need not satisfy the heightened vagueness standards applicable to criminal statutes that impinge on First Amendment freedoms, because, in the government's view, the statute regulates conduct, not speech, and does not violate the First Amendment. U.S. Br. 17. As we show in Point II, the government's premise is incorrect, as the provisions do violate the First Amendment as applied to plaintiffs' pure speech. But more fundamentally, the government mischaracterizes vagueness doctrine.

Heightened standards apply not merely to statutes that otherwise *violate* the First Amendment, but to statutes that are "capable of reaching" protected speech. *Smith v. Goguen*, 415 U.S. 566, 573 & n.10 (1974); *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (heightened vagueness standard applies if statute "threatens to inhibit the exercise of constitutionally protected rights"). If the heightened standard applied only to laws that independently violate the First Amendment, it would be redundant, because any statute to which it applied would be independently unconstitutional on other grounds.

The government cannot deny that the provisions are "capable of reaching" protected expression. It insists that they criminalize human rights advocacy, amicus briefs, op-ed essays, and lobbying Congress—all classic forms of protected speech—so long as they are done in conjunction with a proscribed group. And its invocation of *O'Brien's* intermediate *First Amendment* scrutiny is itself a concession that the provisions implicate expression, because otherwise even intermediate scrutiny would not apply. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*, 547 U.S. 47, 66 (2006).

The government's next error is to assert that the statute's express *scienter* requirement saves the provisions from vagueness. U.S. Br. 13, 17-18. But the requirement that defendants know the organization they support is a "foreign terrorist organization" does not even speak to the vagueness issue here—namely, what types of speech are proscribed by the advice, training, personnel, and service terms. Moreover, unlike a *scienter* requirement of specific intent to advance terrorist activities, the requirement that one know that a recipient organization is designated neither excludes plaintiffs' proposed peaceful political speech nor radically shrinks the range of uncertain application of the statute to protected speech.

The government also errs in arguing that plaintiffs' use of the challenged terms as shorthand to describe their own activity confirms that the terms are not vague as a legal matter. U.S. Br. 14, 28. The fact that a term is used as a general descriptive matter in the English language does not make it a permissible basis for criminalizing speech. Plaintiffs have consistently maintained that their proposed

speech is sufficiently close to what the provisions appear to prohibit to establish standing to sue, but have simultaneously argued that the legal terms themselves are insufficiently clear to satisfy the vagueness doctrine.[1] That plaintiffs did not preface their every reference to their speech with the adjective "apparently" does not defeat their challenge.

The above flaws infect the government's analysis of all four provisions. The government fares no better in defending each provision standing alone.

A. Training

Every judge to have ruled on the "training" prohibition in this case, both before and after Congress amended it, has concluded that it is fatally unclear about what speech is prohibited. Yet the government insists that persons of ordinary intelligence would implicitly understand what none of these federal judges could—namely, the difference between instruction in "specific skills" and instruction in "general knowledge." Everyone knows what is "commonly known," the government maintains, and therefore Congress can make it a crime to make a mistake about the difference between the "general" and the "specific."

Like the distinction between "general" and "elaboration" declared unconstitutionally vague as a standard for bar discipline in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1033-34 (1991), the "training" definition rests on an inescapably subjective general-specific distinction. If such a distinction is

---

[1] *See, e.g.*, Fertig Dec., J.A. 99 (expressing concern that Humanitarian Law Project's speech "would appear to fall within the still-broad definitions of the material-support statute").

impermissible even where no criminal sanctions are involved, it is *a fortiori* impermissible where a felony conviction is at stake.

The government's attempts to distinguish *Gentile* are unpersuasive. If *Gentile* involved "classic political speech," U.S. Br. 23, so does this case: teaching people to advocate for peace and human rights is at least as "political" as commenting on a criminal case. Moreover, neither *Gentile* nor any other case suggests that vagueness standards apply differently to "classic political speech" and all other protected expression.

The government also contends that, unlike in *Gentile*, the distinction between "general knowledge" and "specific skills" has a "settled usage," U.S. Br. 24. But the best the government can cite for support (U.S. Br. 21, 24) is *Pierce v. Underwood*, 487 U.S. 552 (1988), which (a) presented no vagueness challenge, (b) involved a non-criminal statute, the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, that does not use the terms "general knowledge" or "specific skills," and (c) actually underscores the terms' ambiguity here. In *Pierce*, the Court interpreted an EAJA provision authorizing enhanced attorney fees to require judges to distinguish between cases requiring "general lawyerly knowledge" and those demanding "distinctive knowledge or specialized skill," such as patent law expertise. 487 U.S. at 572. Judicial determination of attorney compensation is a far cry from criminalizing speech, and nothing in *Pierce* suggests otherwise.

In any event, the EAJA standard only underscores the vagueness of the "training" definition as regards plaintiffs' proposed speech. Under EAJA,

the litigation of individual rights complaints against the federal government, even when involving complex regulatory schemes, is not generally treated as involving specialized skill warranting increased compensation; and surely the government would not urge otherwise. *See, e.g., Healey v. Leavitt*, 485 F.3d 63, 68-71 (2d Cir. 2007). The EAJA standard would seem to make plaintiffs' proposed human rights instruction "general knowledge" *excluded* from the "training" prohibition—the very opposite of the government's assertion that plaintiffs' proposed speech is prohibited. U.S. Br. 14.

The government cites numerous statutes using the term "training" (U.S. Br. 20 n.2), but not one of them uses the term to separate criminal from non-criminal conduct. Most impose no penalty whatsoever. The government has cited no criminal statute—federal or state—imposing criminal sanctions on speech on the basis of a distinction between the general and the specific.[2]

B. Expert Advice or Assistance

The "expert advice or assistance" prohibition similarly employs terms too uncertain for the present criminal context, leaving plaintiffs to guess whether their speech derives from "scientific, technical, or

---

[2] The Sentencing Guidelines' reference to "special skill" (*see* U.S. Br. 22 n.3) is inapposite. The provision does not separate criminal from non-criminal conduct, but addresses only sentencing. Because convicted defendants have no right to a particular sentence within the legislative range, our legal systems have long permitted highly discretionary sentencing under standards that would be unconstitutionally vague if used to define criminal behavior in the first place. *See United States v. Wivell*, 893 F.2d 156, 159-60 (8th Cir. 1990) ("[T]he Sentencing Guidelines are simply not susceptible to a vagueness attack.").

other specialized" knowledge, or some other unspecified kind of knowledge. The standard's similarity to Federal Rule of Evidence 702 cannot establish its sufficiency here: the Rules of Evidence use many terms—*e.g.*, "more probative than prejudicial," "in the interests of justice," "equivalent circumstantial guarantees of trustworthiness"—that are acceptable for judges making discretionary evidentiary rulings while presiding over trials, but undoubtedly would be vague if imposed on the general public as grounds for criminalizing speech. Different contexts and consequences demand different standards.

The "expert advice" definition suffers from the same indeterminacy—for crime-defining purposes—as the general/specific distinction for "training." Is advising on human rights or political advocacy derived from "scientific, technical, or specialized knowledge" (to make it forbidden here) or is it derived from a lawyer's "general knowledge" (the opposite of "specialized" in *Pierce*)? The difficulty of assessing not only what is "specialized" or "technical," but what is "derived from" such knowledge, renders this standard too indeterminate to be a permissible basis for criminalizing speech.

The government sought below to offer comfort by identifying geography as illustrative of a subject within "general knowledge," *see* Pet. Br. 27-28 & n.13, but now warns that a citizen must avoid "geoscience" or "geopolitics." U.S. Br. 24 n.5. Yet the government says nothing about distinctions among physical, economic, cultural, political, and other aspects of geography, leaving one to wonder what facts about a place on the planet are permissible to teach—or whether it matters if the speaker "derived"

the information he conveyed from a college class, a high school textbook, an academic journal, or *National Geographic*. The government offers no answer because the provision is fundamentally indeterminate.

The government now proposes that "expert advice" encompasses speech derived from knowledge that is "specific, practical, and related to a particular branch of science or a profession," U.S. Br. 31, or from "knowledge relating to subject matter and based on experiences not usually possessed or shared by the general public." *Id.* at 30. These definitions do not clarify matters. Is advice based on human rights, political advocacy, or peacemaking derived from "specific" and "practical" knowledge? Where does one find a gauge of what knowledge or experiences are "usually" possessed by the "general public"? And even if these questions could be answered, how is a citizen supposed to know that they are the right questions to ask, given that these are not the statute's terms?

The government introduces still further ambiguity by arguing that citizens should be guided by the other forms of aid prohibited in the statute—such as "'false documentation or identification, communications equipment, * * * weapons, lethal substances, [and] explosives.'" U.S. Br. 32 (arguing that this "list demonstrates the types of 'scientific' and 'technical' 'advice or assistance' that concerned Congress"); *id.* at 39 (same argument for "service" prohibition). A citizen seeking to discern the meaning of "expert advice" from the other forms of prohibited support could reasonably conclude that it forbids only advice that furthers a group's violent ends. He could hardly

expect that speech with no nexus to violence, and even speech designed to *reduce* resort to violence, would be viewed as "like" providing explosives and lethal substances.

Congress's directive that the statute not be interpreted or applied in a manner that abridges First Amendment rights (§ 2339B(i)) exacerbates this confusion. That provision might reasonably suggest that advice about human rights, which is usually protected speech, is *not* to be treated like "explosives." But the government apparently draws the opposite conclusion. U.S. Br. 14. Alternatively, that provision requires citizens to undertake the complex doctrinal analysis illustrated by the briefs in this case simply to assess whether their speech is permitted or proscribed. Either way, it offers no clarifying guidance to an ordinary person.

C. Service

The government's attempt to defend the prohibition on "service" underscores the provision's vagueness in multiple ways. First, the government offers three dramatically different definitions of "service" in just a few paragraphs. It first contends that the prohibition covers any act done "for the benefit of" a designated group, U.S. Br. 38, then that it might be (much more narrowly) limited to acts done "at the command of" a designated group "to further its goals and objectives," *id.* at 40, and finally that it might encompass services provided at an organization's "behest," *id.* at 41, yet a third concept presumably broader than "command" but narrower than "for the benefit." If the government itself cannot decide, how are plaintiffs to decipher the prohibition's meaning?

Moreover, the two narrowing definitions ("command" and "behest") are so fundamentally at odds with the statute's asserted purpose of halting "aid" to designated groups that few citizens could reasonably rely on them. Would the government really assert that the provision of some valuable non-speech service (such as surveying and mapping a target site) is not a prohibited "service" because it was neither commanded nor requested? The government nowhere explains how any of plaintiffs' proposed activities would be deemed at the behest, much less command, of the LTTE or the PKK, yet it insists that they would all be covered. U.S. Br. 14, 41-42.

Second, in response to plaintiffs' argument that there are internal contradictions between what the "training," "expert advice," and "personnel" provisions expressly do *not* cover—"general knowledge," non-specialized advice, and "entirely independent" activity—and what "service" prohibits, *see* Pet. Br. 38-40, the government advances a new argument, never proposed previously, that the "service" provision should be interpreted to incorporate *sub silentio* all of those exceptions. U.S. Br. 40. The government does not explain how an ordinary citizen should glean this from the face of the statute, particularly when it took the government's own lawyers several years to come up with this reading. In any event, the proposal introduces to the interpretation of "service" *all* of the uncertainty regarding the line between the "general" and the "specific" that infects each of the narrower provisions. *See* Pet. App. 25a. (The same would be true of "personnel," as the same *noscitur a*

sociis argument would presumably guide interpretation of that term as well.)[3]

Third, in response to plaintiffs' reasonable concern that the "service" ban could bar even independent advocacy done "for the benefit of" a designated organization, the government asserts that because the statute prohibits only the provision of service "to" a designated group, it requires "a direct relationship with the foreign terrorist organization." U.S. Br. 39. A citizen could not remotely rely on that view. Independently acting to benefit someone is not uncommonly labeled rendering a service to him. And the government offers no specification as to what sorts of coordination amounts to a "direct relationship," a term that does not even appear in the statute. Would any communication with any member be sufficient? With a leader? Must the "relationship" have any formal elements, such as an employment or contractual relationship? What about a relationship through an intermediary? The government's "direct relationship" gloss only further muddies the waters.[4]

Finally, the government asserts that the statute permits plaintiffs to join or associate with designated

---

[3] The vagueness created by the provisions' interaction is further illustrated by the fact that some of the government-supporting amici take precisely the opposite view, contending that conduct excluded by one provision is prohibited by others. Amicus Br. of Scholars, Attorneys, and Former Public Officials 33.

[4] The statutory word "to," on which the government rests its interpretation, applies not only to "service" but to all material support. Would the government contend that an individual who gave explosives to an intermediary so that the intermediary could give them to a designated organization is not liable under the statute, because he lacked a "direct relationship" with the designated group?

groups and to communicate freely with the groups and their members (U.S. Br. 37-38, 61), yet simultaneously insists that anything of benefit done in conjunction with a designated group may be a crime. *Id.* at 35, 38. It studiously avoids offering any guidance, however, as to the scope or degree of coordination that transforms protected advocacy into a crime. In short, the scope of "service," left undefined by Congress, remains hopelessly unclear, and plaintiffs are left to fear that anything they do that might benefit the group could trigger a prosecution.[5]

D. Personnel

Plaintiffs' principal vagueness objection to the "personnel" prohibition is that it leaves undefined a vast gray area between "entirely independent" activity, which the provision expressly states does not fall under "personnel," and prohibited action taken under a group's "direction or control." In that vast area are many forms of coordination, leaving plaintiffs deeply uncertain as to what is permissible. Pet. Br. 36-38.

The government maintains that "direction or control" should be understood by reference to "concerted activity" under the Sherman Act § 1. This is the first time in this decade-long litigation that the government has suggested such a reading, even though it

---

[5] Another of the government-supporting amicus briefs maintains that to determine whether any speech provided to a designated group is prohibited by any of the four prohibitions, plaintiffs must also determine whether it is "material," which turns on whether the recipient would "value the advice," thus turning the criminal sanction on the hypothesized response of the listener, a position the government has never advanced. Amicus Br. of Maj. Gen. John D. Altenburg, et al. 23-24. Such disagreement about the meaning of the prohibitions further illustrates their vagueness.

now argues that any ordinary citizen should have known it all along. In fact, the concepts appear to be quite different.[6]

Under Section 1 of the Sherman Act, two persons can reach an agreement as equals on a course of conduct without either one acting under the other's "direction or control." The government cites no antitrust decision that makes "direction or control" either a sufficient or a necessary condition of concerted activity: they are different concepts. An agreement is present under antitrust law when two parties merely exchange oral unenforceable promises, even when they are free to walk away at any time, so that neither is under the other's direction or control. *See United States v. Container Corp. of Am.*, 393 U.S. 333, 335 (1969); 6 Phillip Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 1404 at 18 (2d ed. 2003). Moreover, proof of direction and control will not always establish an agreement for antitrust purposes. *See Fisher v. City of Berkeley*, 475 U.S. 260, 267 (1986) (control by a regulator is insufficient to establish an agreement for Sherman Act purposes); *see also* 6 P. Areeda & H. Hovenkamp, ANTITRUST LAW ¶ 1408 at 39-40 (party's acts motivated by fear of another sometimes, but not always, involve agreement). The antitrust concept of agreement—concerted action—thus appears to have little in common with the

---

[6] Here, too, the government and amici that seek to lend it support offer conflicting readings of the provisions they both insist are so clearly defined. Thus, one amicus brief maintains that "personnel" prohibits the "provision of individuals ready to obey the DFTO's orders" and "ready to do the DFTO's bidding," concepts that seem significantly more demanding than the government's proposed "concerted activity" standard. Amicus Br. of Scholars, *supra*, at 30-31.

"direction or control" required by Section 2339B(h). Indeed, it would be surprising if the government, in its role as antitrust enforcer, would ever agree that, to prove a Section 1 agreement, it had to prove facts showing that one party worked under the other's "direction or control."

That the government had to reach so far to import an inapt notion into Section 2339B(h) this late in the litigation confirms the inherent uncertainty of the statute's language as applied to plaintiffs' speech. Its citation to other federal statutes using the terms "direction or control" do not help, as they involve employment relationships (a concept quite distinct from "concerted action") or regulate underlying conduct that is unlawful independent of the statutorily designated relationship. None of the cited statutes threatens to criminalize otherwise-protected First Amendment activity based solely on varying levels of coordination with a designated group. None creates the problematic gray area presented here by carving out "entirely independent" activity. And none of the statutes has been read, as the government now suggests the "personnel" provision here should be read, to encompass all "concerted activity."[7]

---

[7] The only two criminal statutes the government cites that use "direction or control" are manifestly different. The first, 18 U.S.C. § 175b(d)(2)(G), prohibits possession by "restricted persons" of certain biological agents, and defines "restricted persons" to include, *inter alia*, "an alien who . . . acts for or on behalf of, or operates subject to the direction or control of, a government or official of a country described in this subparagraph." The underlying prohibition on possessing biological agents has no nexus to protected speech, and thus need not satisfy heightened vagueness standards. The second, 18 U.S.C.

E. The Provisions Are Invalid on Their Face

The government erroneously asserts that plaintiffs "do not challenge the statute on its face." U.S. Br. 18. In fact, plaintiffs expressly argued that the four challenged provisions are so profoundly indeterminate that they are facially overbroad as well as vague. Pet. Br. 42-43, relying on *United States v. Williams*, 128 S. Ct. 1830, 1845 (2008). The many examples of how these provisions interfere with the work of peace groups such as the Carter Center,

---

§ 951, requires "agents" of foreign governments to register, and defines "agent of a foreign government" as "an individual who agrees to operate within the United States subject to the direction or control of a foreign government or official." 18 U.S.C. § 951(d). That statute, unlike this one, invokes a traditional agency relationship, and does not purport to encompass all concerted activity, or to carve out only "entirely independent activity."

None of the lower court decisions that have rejected vagueness challenges to the "personnel" prohibition in Section 2339B involved the type of loosely coordinated speech in which plaintiffs seek to engage. Rather, they involved nonspeech conduct and either an employment or command-and-control relationship. *See United States v. Taleb-Jedi*, 566 F. Supp. 2d 157, 182 (E.D.N.Y. 2008) (defendant created an "employment relationship" with designated group); *United States v. Goba*, 220 F. Supp. 2d 182, 194 (W.D.N.Y. 2002) (defendant allowed himself "to be indoctrinated and train[ed]" with weapons in an Al Qaeda training camp); *United States v. Lindh*, 212 F. Supp. 2d 541, 545-46 (E.D.Va. 2002) (defendant fought in Taliban unit and received military training under Al Qaeda). In the only case involving a more ambiguous relationship, the court found that while the "personnel" provision was not vague as applied to the receipt of training in an Al Qaeda terrorist training camp, the provision was vague as applied to "allegations that [the defendant] remained in communications with Al Qaeda associates after he returned to Canada." *United States v. Warsame*, 537 F. Supp. 2d 1005, 1010 (D. Minn. 2008).

Christian Peacemaker Teams, and the International Crisis Group illustrate the real-world implications of this facial vagueness and overbreadth. *See* Amicus Br. of Carter Center, et al. 12-28.

The government's contention that the court of appeals confused the vagueness and overbreadth doctrines (U.S. Br. 42-43) ignores this Court's own linking of the doctrines when vague statutes implicate speech—not only in *Williams*, but elsewhere. *See Cox v. Louisiana*, 379 U.S. 536, 551 (1965) (statute facially invalid because it is "unconstitutionally vague in its overly broad scope" and "would allow persons to be punished merely for peacefully expressing unpopular views"); *Village of Hoffman Estates*, 455 U.S. at 494 (heightened vagueness standard applies where statute implicates free speech).

In sum, the problem here is not that one can hypothesize close cases that are difficult to decide, but that the statutory standards themselves are too indeterminate for the imposition of criminal penalties on speech. They leave plaintiffs and others in the dark as to what level of coordination will constitute a service or personnel, what speech is derived from "specialized knowledge," imparts a "specific skill," or constitutes "general knowledge," what renders advocacy "independent," and how the provisions interact with each other and with the rest of the statute.[8]

---

[8] One of the government-supporting amicus briefs argues that the vagueness of the statute is mitigated by the opportunity to apply for a license for certain limited legal services. Amicus Br. of Scholars, *supra*, at 24-28 (citing 31 C.F.R. § 597.505(a)). But that regulation has a limited reach, focused on very specific legal services, and would not cover the types of advice, training, and service that HLP seeks to provide to the

II. THE CHALLENGED PROVISIONS VIOLATE THE FIRST AMENDMENT BECAUSE THEY IMPOSE CONTENT-BASED PROHIBITIONS ON SPEECH BASED ON ITS COMMUNICATIVE IMPACT

Despite the fact that the provisions as applied here criminalize pure political speech on the basis of its content, the government contends that only *O'Brien* intermediate scrutiny is warranted because the challenged provisions are part of a general regulation of conduct—assertedly aimed at preventing "aid" to designated organizations—that only incidentally affects expression. But *O'Brien* is inapplicable here, because it is limited to *content-neutral* statutes that, as applied, regulate the *noncommunicative* aspect of expressive conduct. In any event, the government's attempt to criminalize plaintiffs' proposed advocacy of human rights, peacemaking, and other lawful activities, cannot survive even intermediate scrutiny.

A. *O'Brien* Does Not Apply to Provisions That Criminalize Pure Speech Based on Its Communicative Impact.

In *O'Brien*, this Court held that where a law regulates conduct on a content-neutral basis, its regulation of the "nonspeech element" of expressive conduct is constitutional if the government can establish that

---

PKK. In any event, as the government tacitly acknowledges by not making this argument, a constitutionally vague statute is not saved by inclusion of a licensing provision that effectively acts as a prior restraint. *Thomas v. Collins*, 323 U.S. 516, 540 (1945); *see also Citizens United v. FEC*, No. 08-205, slip op. 18-19 (U.S. Jan. 21, 2010).

it furthers a "substantial government interest" that is "unrelated to the suppression of free expression" and that the restriction on expression is "no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 376, 377.

The Court subsequently established, in *Texas v. Johnson*, 491 U.S. 397 (1989), that in order for *O'Brien*'s intermediate scrutiny to apply at all, the government's interest in regulating must be unrelated to the conduct's expressive element, or "communicative impact." *Id.* at 411 & n.8; *see id.* at 407 ("[W]e have limited the applicability of *O'Brien*'s relatively lenient standard to those cases in which 'the governmental interest is unrelated to the suppression of free expression'") (quoting *O'Brien*, 301 U.S. at 377). The Court explained: "the communicative nature of conduct [is] an inadequate *basis* for singling out that conduct for proscription." *Id.* at 406 (emphasis in original). Accordingly, "a law *directed at* the communicative nature of conduct must, like a law directed as speech itself, be justified by the substantial showing of need that the First Amendment requires." *Id.* (emphasis in original).

The *Johnson* Court held that the state's interest in preserving the flag as a symbol of nationhood and national unity, *as applied to Johnson's conduct*, 491 U.S. at 403 n.3, was related to the suppression of expression, because the only way Johnson's flagburning could undermine that interest was by virtue of what it expressed, *i.e.*, through its communicative impact. Accordingly, the Court treated it as a content-based regulation of speech and applied strict scrutiny. *Id.* at 410-20.

Where, as here, the state seeks to criminalize not conduct, but pure speech, *O'Brien* is even more clearly inapplicable. Thus, in *Cohen v. California*, 403 U.S. 15, 18 (1971), the Court held *O'Brien* inapplicable to an otherwise-valid breach-of-the-peace law when applied to penalize pure speech:

> The conviction quite clearly rests upon the asserted offensiveness of the *words* Cohen used to convey his message to the public. The only "conduct" which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon "speech," not upon any separately identifiable conduct.

Id. (emphasis in original) (internal citation removed); *see also Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975) (same); Pet. Br. 61-62.

As in *Cohen*, so here, the only "conduct" the challenged provisions would penalize, as applied, is "the fact of communication." There is literally no "nonspeech element" or "noncommunicative conduct" being regulated. In this respect, this case is analogous to *Street v. New York*, 394 U.S. 576 (1969), which involved a statute barring both flagburning and "cast[ing] contempt upon [it] by words." *Id.* at 578. Without questioning the validity of the flagburning prohibition, the Court overturned the conviction because Street may have been convicted for his words. *Id.* at 590-94. Here, as in *Street*, some parts of the statute apply to conduct. But as applied, the challenged provisions criminalize only words—indeed, "political speech," which "must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United*, slip op. 23. Strict scrutiny applies. *Id.*, slip op. 33 ("If the First Amend-

ment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.").

As in both *Johnson* and *Cohen*, the government's interest is necessarily "related to the suppression of expression." The government claims that it seeks to deny "aid" to designated groups, whatever form that aid takes, and therefore its interest is not related to expression. But the only way that plaintiffs' speech can possibly "aid" the PKK or the LTTE is by virtue of what it communicates, either to their members or to non-members, and thus the government's interest in preventing *that* "aid" is necessarily an interest in suppressing expression. Similarly, in *Cohen*, the state's general interest was in averting breaches of the peace, but as applied to Cohen that interest was "related to the suppression of expression," because the only way the words on Cohen's jacket could have disrupted the peace was by virtue of what they communicated.[9] *Cohen*, 403 U.S. at 18.

One simply cannot separate out preventing "aid" as an expression-independent interest for the statute's application here, because the only "aid" plaintiffs propose to provide is 100 percent speech. *See* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, 'Situation-Altering Utterances,' and the Uncharted Zones*, 90

---

[9] *See* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1497 (1975) ("The reference of *O'Brien*'s second criterion is therefore not to the ultimate interest to which the state is able to point, for that will always be unrelated to expression, but rather to the causal connection the state asserts.").

Cornell L. Rev. 1277, 1284 (2005) ("[W]hen a generally applicable law is content-based *as applied*—when speech triggers the law because of the harms that may flow from what the speech says—the law should be subject to full-fledged First Amendment scrutiny.") (emphasis in original).[10]

A law that banned all conduct "that interfered with the draft" could not be defended under *O'Brien as applied to an anti-draft speech*. As applied, the law would not be regulating any "nonspeech element," and the government's interest would not be "unrelated to the suppression of expression." Such a prosecution, as in *Street* and *Cohen*, would properly be viewed as a regulation of *speech* based on its communicative impact, and would trigger strict scrutiny. So too here.

The government's interest in the suppression of expression is further underscored by its assertion

---

[10] At times, the government seems to deny that the statute penalizes speech at all: it maintains that the statute "does not target expression at all," U.S. Br. 46; that "Sections 2339A and 2339B say nothing about speech," *id.*; and that the statute does not regulate "speakers attempting to reach particular audiences," *id.* at 50. This is false both on its face and as applied. Prohibitions on "advice" and "training" are nothing if not a regulation of speech. And as applied here, the government concedes the provisions criminalize such core speech as lobbying Congress or writing amicus briefs, as well as teaching or advising "particular audiences." As the Solicitor General wrote when an academic, this conflation of speech and conduct renders the doctrine incoherent: "For a court to . . . classify an explicit speech-directed action as 'incidental' whenever it can be conceptualized as a component of a broader, nonspeech prohibition would subvert the very basis of the doctrine [of incidental restraints]." Elena Kagan, *When A Speech Code Is a Speech Code: The Stanford Policy and the Theory of Incidental Restraints*, 29 U.C. Davis L. Rev. 957, 961-62 (1996).

that it seeks to penalize even advocacy of lawful, peaceable activity because such advocacy might lend "legitimacy" and "good will" to designated groups. *See infra* pp. 34-35 (quoting government briefs). This interest, articulated by counsel below as a desire to make proscribed groups "radioactive," is directly and necessarily related to the suppression of expression, because only speech that expresses a message of legitimacy will even potentially implicate the government's interest.

The government's reliance on *United States v. Albertini*, 472 U.S. 675 (1985), U.S. Br. 46, 52, is misplaced, because there the government's regulation of conduct was unrelated to expression. *Albertini* upheld a conviction for violating an order barring entry to a military base. The order barred the *conduct* of re-entry for any reason, and therefore the government's interest was in prohibiting the noncommunicative aspect (the physical entry) and not in suppressing whatever communication Albertini desired to express once on the base. *Albertini*, 472 U.S. at 685-86. Here, by contrast, the provisions criminalize pure speech because of what it communicates.

The government argues that the provisions at issue can be likened to other criminal offenses that "usually are accomplished through the use of words," such as conspiracy, fraud, bribery, and extortion. U.S. Br. 46. But those laws prohibit only speech that is specifically intended to further, and inextricably intertwined with, independently unlawful conduct, or that is itself unprotected. None of those laws prohibits speech advocating lawful, nonviolent activity. A conspiracy conviction requires proof of an agreement to engage in some distinct criminal conduct.

Fraud is an intentional falsehood causing personal harm (by transfer of money or otherwise). Bribery involves the act of providing money or other things of value in exchange for official action. Extortion involves use or threats of force, violence, fear, or official power to obtain property. Such "long-established criminal proscriptions," *Williams*, 128 S. Ct. at 1841-42, involve features wholly missing here.[11] Section 2339B's novel and sweeping prohibitions prevent plaintiffs from engaging in speech that does not intend to induce any independently illicit activity or involve any intentional falsehoods or threats.

Were the Court to accept the government's invitation to apply *O'Brien*'s more relaxed scrutiny to laws that criminalize pure speech based on its communicative impact merely because they also regulate conduct in other provisions or applications, First Amendment doctrine would need to be radically revised. The Court has reversed numerous convictions for protected speech and assembly under facially content-neutral "breach of the peace" and "disorderly conduct" laws.[12] In these cases, the Court generally did not question the facial validity of the laws, which did not target speech. But the Court nonetheless repeatedly reversed convictions on the ground that the statutes were unconstitutional *as applied* to

---

[11] This Court has described categories of speech like conspiracy and fraud as unprotected, not even triggering *O'Brien* scrutiny. *Williams*, 128 S. Ct. at 1841-43. The government's concession that at a minimum *O'Brien* applies here thus undermines its asserted analogy to conspiracy, fraud, and the like.

[12] *See, e.g.*, *Cohen v. California*, *supra*; *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963); *Gregory v. City of Chicago*, 394 U.S. 111, 112-13 (1969); *Cox v. Louisiana*, 379 U.S. 536, 545-52 (1965); *Cantwell v. Connecticut*, 310 U.S. 296, 308-09 (1940).

peaceable speech and assembly. As the Court stated in *Cantwell v. Connecticut*, 310 U.S. 296, 308-09 (1940), a "breach of the peace" law legitimately "embraces a great variety of conduct," including "violent acts," but is unconstitutional as applied to a conviction for speech because of "the effect of [the speaker's] communication upon his hearers." *Id.* at 309.

Similarly, in *De Jonge v. Oregon*, 299 U.S. 353 (1937), the Court did not question the validity of the criminal syndicalism statute on its face, but struck down its particular application because, as applied, it criminalized pure speech and "peaceable assembly." *Id.* at 365; *see also* Pet. Br. 53-54, 57-58. And in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 909-10 (1982), the Court invalidated a tort judgment using strict First Amendment scrutiny where a facially neutral business-interference tort cause of action, which legitimately encompassed a wide range of conduct, was applied to hold the organizers of a boycott liable for their speech and association. Under the government's approach, all of these cases should have triggered only *O'Brien* scrutiny, because they criminalized speech pursuant to an otherwise facially valid regulation of conduct. But when such laws were applied to penalize pure speech, this Court subjected the applications to strict, not intermediate, scrutiny. *See* Volokh, *Speech as Conduct*, 90 Cornell L. Rev. at 1286-93. The Court should do the same here.

B. *O'Brien* Does Not Apply Because the Challenged Provisions Are Not Content-Neutral.

O'Brien is also inapplicable for the separate reason that the challenged provisions are content-based

on their face. Recognizing that *O'Brien*'s scrutiny is limited to content-neutral statutes, the government repeatedly insists that the provisions here are content-neutral. *See, e.g.*, U.S. Br. 45 ("2339B does not target expression at all, let alone expression of a certain content or viewpoint"); *id.* at 46 ("Sections 2339A and 2339B say nothing about speech, much less about the content of any speaker's message"); *id.* at 47 ("the statute's aim is not the content or viewpoint of the speech"). But no matter how often the government repeats them, these claims cannot be squared with the language of the statute itself.

As the government agrees, whether a statute is content-based or content-neutral "'is something that can be determined on the face of it; if the statute describes speech by content then it is content-based.'" U.S. Br. 46 (quoting *City of Los Anegeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring)). Here, the statute is nakedly content-based in several respects.

The statute entirely exempts the provision of religious materials. It is as if the law in *O'Brien* banned draft card burning, except for religious purposes. Statutes that distinguish religious and nonreligious expression are content-based, and in some settings even viewpoint-based. *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 830-37 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993). The government's only defense of this expressly content-based distinction is a footnote that merely quotes the court of appeals' assertion that Congress "is entitled to strike such delicate balances." U.S. Br. 51 n.11. But that assertion does not dispute that the "religious materi-

als" exemption is content-based. And when the government discriminates on the basis of content, it is not enough merely to assert that it is a "delicate balance," even when foreign policy is implicated; the government bears the heavy burden of satisfying strict scrutiny. *Boos v. Barry*, 485 U.S. 312 (1988). The government has made no attempt to explain what compelling government interest made it necessary to exempt the provision of unlimited religious materials to designated foreign terrorist organizations—even materials calling for violent jihad—while criminalizing advocacy of peace and human rights.

In addition, the "training" and "expert advice" provisions both "describe[] speech by content." Speech whose content instructs in "general knowledge" is permissible; speech whose content conveys "specific skills" or is "derived from . . . specialized knowledge" is proscribed. And according to the government, the same content distinction applies to "service" and "personnel." U.S. Br. 40. It is not just, as the government says in a striking understatement, that training and advice "usually are accomplished through the use of words." U.S. Br. 46. The statute expressly defines prohibited and permitted speech by reference to its content, and plaintiffs cannot determine whether their speech is prohibited except by reference to its content.

Quoting *Hill v. Colorado*, 530 U.S. 703, 721 (2000), the government argues that it is not improper "'to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct.'" U.S. Br. 51. But as previously explained, Pet. Br. 50 n.27, the Court treated the regulation in *Hill* as a content-neutral

"time, place, and manner" restriction on all "picketing," which simply restricted the place at which the speech could occur and did not "accord[] preferential treatment to expression concerning one subject matter," 530 U.S. at 722. Here, the government concedes that the statute is not a time, place, or manner restriction, U.S. Br. 49, and does not deny that it discriminates in favor of speech that addresses religious or "general knowledge" subjects, totally barring the non-preferred speech "to" the disfavored listener at any time or place, or in any manner.

Thus, because the challenged provisions, as applied here, regulate plaintiffs' pure speech based on its communicative impact, because the government's asserted interest is precisely in "the suppression of expression" that aids designated groups, and because the provisions expressly discriminate on the basis of content, *O'Brien*'s intermediate scrutiny is inapplicable. Rather, "we are outside of *O'Brien*'s test, and we must ask whether th[e government's] interest justifies [criminalizing plaintiffs' proposed speech] under a more demanding standard." *Texas v. Johnson*, 491 U.S. at 403. But the government nowhere even tries to defend the measures at issue here under strict scrutiny.

C. The Provisions Cannot Survive Even Intermediate Scrutiny

The nature of the speech at issue here makes the provisions invalid as applied no matter what standard of review governs. When peaceful protected speech or advocacy of lawful activities is involved, the Court has repeatedly rejected government justifications for criminalization as insufficient, whether the government seeks to deny aid to the Communist

Party, *De Jonge*, *supra*; to secure peace and safety during war, *Taylor v. Mississippi*, 319 U.S. 583 (1943); to protect children from sexual exploitation, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); to limit the exposure of confidential communications to the public, *Bartnicki v. Vopper*, 532 U.S. 514 (2001); or to prevent a breach of the peace, *Cox*, *supra*; *Gregory*, *supra*. The government has not cited a single decision of this Court upholding a law that criminalized peaceable speech or advocacy of lawful activities, under any standard of review.

Even if this Court were to conclude that the government's interest in criminalizing the specific speech at issue is "unrelated to the suppression of expression"—which it should not, *see* II.A., *supra*; Pet. Br. 62, 65—application of the provisions here would fall under *O'Brien*. The government cannot establish that criminalizing plaintiffs' proposed speech restricts expression no more than is necessary to further the government's interests.

In this as-applied challenge, the government's burden is to justify criminalizing *plaintiffs' specific speech*, not the statute in general. In *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449 (2007), for example, this Court entertained a pre-enforcement as-applied challenge to § 203 of the Bipartisan Campaign Reform Act (BCRA), even though the Court had previously upheld that very provision as facially valid. As the Court explained, "[t]hese cases, however, present the separate question whether § 203 may be constitutionally applied to these specific ads . . . the Government must prove that applying BCRA to WRTL's ads furthers a compelling interest and is narrowly tailored to achieve

that interest." *Id.* at 464.[13] Thus, the First Amendment question presented here is not whether Section 2339B is generally valid, nor whether the four challenged provisions are valid in other applications, but only whether the provisions are valid *as applied to plaintiffs' specific proposed speech.*[14]

Moreover, as demonstrated by this Court's detailed examination of evidence in *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180 (1997), it is not enough merely to *assert* interests in the abstract. Rather, the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and meaningful way." *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622, 664 (1994). Thus, the government must demonstrate here that the criminalization of plaintiffs' speech about lawful, peaceable activity is in fact necessary to further its legitimate interests. This it has failed to do.

First, the government cites a congressional finding that terrorist organizations are so "tainted by

---

[13] *See also Greater New Orleans Broadcasting Ass'n, Inc., v. United States*, 527 U.S. 173 (1999) (as-applied First Amendment analysis); *U.S. v. National Treasury Employees Union*, 513 U.S. 454 (1995) (same).

[14] The government and government-supporting amici devote much of their argument to defending other aspects and applications of the statute, which do regulate conduct. But plaintiffs do not challenge other provisions or applications here. To be clear, plaintiffs do not concede that all the statute's other provisions are constitutionally valid, as the government erroneously asserts. U.S. Br. 56 (citing Pet. Br. 55). Plaintiffs have made no such concession. Plaintiffs have simply narrowed their challenge in this Court, not pressing here their original challenge to the ban on providing monetary support that furthered only humanitarian interests.

their criminal conduct that any contribution to such an organization facilitates such conduct." AEDPA, § 301(a)(7), 110 Stat. 1247; U.S. Br. 54. But even if such a generic statement were acceptable as a factual finding in a First Amendment case,[15] it is limited to "contributions," not speech. Congress made no finding that speech advocating lawful activities has that effect; to the contrary, Congress expressly directed that Section 2339B not be interpreted or applied to abridge free speech or association. 18 U.S.C. § 2339B(i).

The government also cites a House Report, U.S. Br. 55, but that Report also speaks in terms of "contributions," not speech. H.R. Rep. 104-383, at 45 (1995). In fact, the Report expressly states that the statute preserved "one's right to think, speak, or opine *in concert with, or on behalf of, such an organization*." *Id.* at 44 (emphasis added). The government below seemed to recognize the intended distinction, citing this language as speech protective and asserting that "Congress noted that the statutory ban 'only affects one's contribution of financial or material resources.'" *See* Pet. Br. 7 (quoting government brief in court of appeals). Notably, the House Report insisted that the statute protected advocacy conducted "in concert" with a designated group (H.R. Rep. 104-383, at 45), directly contrary to what the government seeks to justify here. Thus, neither the House Report nor the congressional finding embodies a determination that speech advocating peaceable activities poses any problem, much less furthers terrorism.

---

[15] *Cf. Bose Corp. v. Consumers Union*, 466 U.S. 485, 503-11 (1984) (appellate courts have independent obligation to assess facts where First Amendment freedoms are at stake).

Nor does the government's rationale for how financial contributions aid terrorism—that money can be commingled with other funds and redirected toward illegal purposes even if donated for a lawful end (U.S. Br. 54-55)—apply to plaintiffs' speech. Human rights advocacy training and peacemaking are not fungible like money. The government identifies no illegal use to which any of plaintiffs' proposed speech could plausibly be put, nor any evidence that such speech has ever been used to further terrorism or any other illegal conduct in the past.

The government contends that plaintiffs' speech might "free up" other resources that the PKK and the LTTE would then be able to devote to terrorism. U.S. Br. 56. This ground, not invoked by Congress and never before held constitutionally sufficient to prohibit speech, is dangerously broad; indeed, the same could be said of independent advocacy and provision of religious materials, both left unproscribed. In order to establish that plaintiffs' proposed training in human rights advocacy and peacemaking would "facilitate" criminal conduct in this way, the government would have to show that terrorist groups, in the absence of such support, would have spent their own resources to obtain such training. The government provides no evidence to support that supposition.

Finally, the government argues that even if human rights training cannot be used to support terrorism directly, and even if it will not free up other resources to spend on terrorism, it may nonetheless "bolster" the organization's "efficacy and strength in a community, thus undermining this nation's efforts to delegitimize and weaken these groups." U.S. Br.

56; *see also* Third Cross-Appeal Br. for Appellants 42 (C.A., filed July 12, 2006) ("even non-fungible support confined to humanitarian purposes causes harm by increasing the terrorist group's good will, recruiting, and image of legitimacy.") This rationale, which government counsel below articulated as an interest in making designated groups "radioactive" that justified prohibiting even the filing of amicus briefs *see* Pet. Br. 49 n.26, is an invalid interest under the First Amendment, because it seeks to suppress a particular message—namely, that groups the United States disfavors are "legitimate."

This is essentially the same interest held insufficient to justify laws penalizing Communist Party membership. This Court never questioned Congress's detailed findings that the Communist Party was part of an international conspiracy using terrorism and other illegal methods to overthrow the United States by force and violence. The government argued that active association would inevitably support the organization's illegal ends.[16] This Court, however, repeatedly insisted that laws must carefully distinguish between those who associated with the Communist Party to further its legal ends and those

---

[16] In *Scales v. United States*, the United States argued that "knowingly joining an organization with illegal objectives contributes to the attainment of these objectives because of the support given by membership itself." U.S. Br. on Reargument at *8, *Scales v. United States*, 367 U.S. 203 (1961) (No. 1), 1959 WL 101542; *id.* at *11 ("Membership in an organization renders aid and encouragement to the organization") (quoting *Frankfeld v. United States*, 198 F.2d 679, 683-84 (4th Cir. 1952)); *id.* at *22-*23 (active membership can be proscribed "even though the activity be expended along lines not otherwise illegal, since active support of any kind aids the organization in achieving its own illegal purposes").

who did so to further its illegal ends. The government's interest in "delegitimizing" the PKK by the means at issue here—prohibiting plaintiffs from advocating in cooperation with it and urging it to use human rights and peacemaking tools—is equally impermissible.

III. THE CHALLENGED PROVISIONS VIOLATE PLAINTIFFS' RIGHT OF ASSOCIATION

For related reasons, the challenged provisions independently violate plaintiffs' right of association. By effectively outlawing all "concerted activity," the services and personnel provisions penalize virtually *anything* one might do in association with a designated group, even if, like De Jonge, one is engaged solely in peaceable advocacy and assembly. And they impose criminal penalties on speech based on the disfavored identity of the organization with which it is coordinated.[17] By acknowledging that plaintiffs' speech and advocacy is protected if engaged in independently of a designated group, U.S. Br. 14, but a crime if cooperation with the group is involved, the government admits that what the statute prohibits is association.

---

[17] The government contends that plaintiffs have abandoned their due process "guilt by association" argument, U.S. Br. 62, despite their having specifically preserved it, Pet. Br. 43 n.23, and having devoted a section of their brief to the claim that the statute impermissibly criminalizes plaintiffs' speech based on association. Pet. Br. 56-59. Since both due process and the First Amendment prohibit guilt by association, and plaintiffs have expressly argued that the statute violates the right of association by imposing criminal liability, the argument is squarely presented.

The government concedes that *De Jonge* establishes that "peaceable assembly for lawful discussion cannot be made a crime." *De Jonge*, 299 U.S. at 365; U.S. Br. 61. But it insists that Section 2339B "does not prevent [plaintiffs] from peaceably assembling with members of the PKK and LTTE for lawful discussion. It prevents the separate step of rendering material support, in the form of property or services." U.S. Br. 61. This is circular: the government simply redefines "peaceably assembling with members of the PKK and LTTE for lawful discussion" of human rights advocacy and peacemaking as a "service." To define "peaceable discussion" as a "service" does not eliminate the First Amendment violation, any more than Oregon's labeling of De Jonge's "peaceable discussion" as "criminal syndicalism" did. The government "cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963).[18]

The statute also violates the right of association by hinging criminal punishment on association. The

---

[18] The government argues, almost in passing, that plaintiffs' right to associate with foreign entities is less "absolute" than with domestic organizations. U.S. Br. 52. But it offers no response to this Court's holding in *Lamont v. Postmaster General*, 381 U.S. 301 (1965), protecting the right of Americans to receive information from the Communist Party abroad (without registering with the government first), nor to the Court's many cases fully protecting the right of association with the Communist Party, notwithstanding the government's contention that it "was under the firm and direct control of the Communist International and, through it, of the Soviet Union." U.S. Br. at *185, *Dennis v. United States*, 341 U.S. 494 (1951) (No. 336), 1950 WL 78653. The only case the government cites, *DKT Mem'l. Fund Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275, 295 (D.C. Cir. 1989), held that family planning organizations lacked standing to challenge AID's anti-abortion funding policies.

statute permits advising the Palestine Liberation Organization (PLO) on peacemaking, because the PLO, despite its notorious terrorist activities, has not been designated a "foreign terrorist organization." But the very same peacemaking advice is a crime if provided to the PKK. The Communist Party cases establish that the government may not impose penalties on peaceful and otherwise-legitimate association with a group simply because the group engages in illegal activities. *See* Amicus Br. of Victims of McCarthy Era (drawing parallels between the challenged provisions and McCarthy-era laws).

The government dismisses the Communist Party right of association cases on the ground that those statutes hinged penalties or denials of benefits on membership or association alone, whereas the challenged provisions of Section 2339B penalize not just association, but association plus something more. U.S. Br. 60. But the only "plus" in these as-applied cases is speech advocating lawful, peaceable activities, which makes the provisions *more* invalid, not less.

On the government's theory, Congress could have reenacted every one of the anti-Communist penalties and disabilities that this Court invalidated, simply by penalizing "speaking in cooperation with" instead of "membership in" the Communist Party. In fact, the Court has never defined the right of association so anemically. What is protected is "the right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). Through the right of association, the Court has protected the right to "peaceably assemble

for lawful discussion," *De Jonge*, *supra*; to solicit members to the Communist Party and circulate literature, *Herndon v. Lowery*, 301 U.S. 242, 245 (1937); to organize a boycott, even where it included substantial acts of violence, *NAACP v. Claiborne Hardware Co.*, 458 U.S. at 907-909; and to litigate for social and political purposes, *NAACP v. Button*, 371 U.S. at 428-30. The right of association is not limited to holding a membership card.

IV. THE COURT CAN AVOID THE CONSTITUTIONAL QUESTIONS PRESENTED BY ADOPTING A SPECIFIC INTENT REQUIREMENT

The Court can avoid all of the above constitutional issues by interpreting the challenged provisions to require proof of intent to further a designated group's terrorist activities when applied to speech. That is the very course this Court took in *Scales v. United States*, 367 U.S. 203 (1967), when confronted with the application of a similarly broadly worded statute penalizing association with the Communist Party.[19] And here, Congress has specifi-

---

[19] Contrary to the government's contention (U.S. Br. 62-63), plaintiffs below consistently urged the interpretation they advance now and invoked the "avoidance" canon. *See* Br. for Appellees at 17, *HLP v. Mukasey*, 552 F.3d 916 (9th Cir. 2007) (Nos. 05-56753, 05-56846) ("The constitutional infirmity identified above can be avoided by interpreting the statute to require proof that the donor specifically intended to further the recipient group's illegal activity."); Br. of Appellees at 33, *HLP v. Mukasey*, 509 F.3d 1122 (9th Cir. 2007) (Nos. 05-56753, 05-56846) ("[T]he Court can avoid the constitutional problems identified above if it interprets the statute to incorporate a *mens rea* requirement that the defendant intended to further the designated organization's illegal activities."); Mem. in Supp. of Summ. J. at 13, *HLP v. Gonzales*, 380 F.Supp.2d 1134 (C.D.

cally directed the courts to construe the statute to avoid First Amendment infringements.

The government contends that interpreting the challenged provisions to require proof of specific intent would not avoid resolution of plaintiffs' claims. But that is wrong. If the Court construed the challenged provisions to require specific intent as applied to speech, the injunction against applying the provisions to plaintiffs' proposed speech could be sustained on statutory grounds, and there would be no need to reach plaintiffs' constitutional challenges. That is avoidance, irrespective of whether a specific intent standard would clearly "save" the challenged provisions from all possible future constitutional challenges. U.S. Br. 63. The canon is about *avoiding* constitutional questions, not resolving them. It is enough that the specific intent construction would permit relief on statutory grounds.

The only constitutional issue plaintiffs present that goes beyond their own conduct (which is undisputedly *not* specifically intended to further illegal ends) is their *Williams* claim of overbreadth because the statute is vague in a substantial range of applications. The Court would not need to reach that

---

Cal. 2005) (No. 03-6107 ABC Mcx.) ("The imposition of a specific intent requirement is . . . essential here."). Both lower courts expressly considered this specific-intent issue. Pet. App. 13a-19a; 47a-60a. In any event, the Court has said that it is independently obligated to adopt a statutory construction that avoids constitutional adjudication if it can do so. *See, e.g., Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). It can do so here, without encountering the problems that barred such an approach in *Citizens United v. FEC*, No. 08-205, slip op. 10-12 (U.S. Jan. 21, 2010).

claim if it afforded plaintiffs relief on statutory grounds. And contrary to the government's suggestion, U.S. Br. 63, that claim *would* be answered by a "specific intent" test. As the government recognizes (U.S. Br. 17-18), and as this Court illustrated in *Scales*, 367 U.S. at 221-30, a properly formulated *scienter* requirement can substantially mitigate vagueness problems by so narrowing the potential applications of the statute that there would be nothing of relative significance that is constitutionally protected within its narrow prohibitions. A statute limited to speech intended to further terrorist activity would not apply to a "substantial" amount of protected speech (if any), and hence would avoid overbreadth.

The government argues that the suggested interpretation is not available because Congress rejected it. U.S. Br. 64. But there is no evidence of such a rejection (and given Congress's explicit instruction to avoid First Amendment infringements, the Court should adopt the intent construction unless Congress expressly rejected it). Congress never considered and rejected a requirement, in Section 2339B, that speech be specifically intended to further terrorist activity. In 2004, Congress adopted a requirement that defendants know that the organizations they support are designated or have engaged in terrorist activities, in response to a court of appeals decision holding that such a requirement was constitutionally mandated. *See HLP v. U.S. Dep't of Justice*, 352 F.3d 382, 393-94 (9th Cir. 2003). But adopting a general knowledge requirement with respect to the identity of a beneficiary for all the statutory prohibitions is not inconsistent with a narrow "specific intent" requirement applicable only where the statute crimi-

nalizes speech. Indeed, as plaintiffs explained in their opening brief, Pet. Br. 67-68, in *Scales* this Court interpreted a statute to require proof of specific intent where Congress had expressly required only "knowing" support. *Scales*, 367 U.S. at 219-24.

The government suggests that Congress must have rejected a specific intent requirement for Section 2339B because it adopted one for Sections 2339A and 2339C. U.S. Br. 64-65. But those provisions do not require specific intent; they permit punishment where an individual knowingly *or* intentionally provides aid to a terrorist act. And the context those provisions address is different: they do not pose the same First and Fifth Amendment concerns as the provisions challenged here, because they are limited to support of specified terrorist acts, rather than organizations more generally. Finally, that Congress did not expressly impose a "specific intent" requirement on *all* forms of "material support" in Section 2339B hardly means that it would flout congressional intent to adopt such a requirement when Section 2339B applies to pure speech. Congress expressly directed the courts to construe Section 2339B to avoid infringement of speech and association rights. The Court in *Scales* has already shown how to do that.

V. GRANTING PLAINTIFFS RELIEF WILL NOT IMPEDE THE GOVERNMENT'S LEGITIMATE INTERESTS IN NATIONAL SECURITY

The government sweepingly invokes national security, calling Section 2339B "one of this nation's most valuable and vital tools in the fight against international terrorism." U.S. Br. 16. Amici make sim-

ilar claims for Section 2339B generally. But what amici, and the government, never do is explain in any persuasive way how tolerating *plaintiffs' proposed speech* will undermine the security of the United States.

There is simply no good reason to think that U.S. security will be endangered if Judge Fertig and the Humanitarian Law Project are permitted to help the PKK learn to bring human rights complaints in Geneva, to assist it in efforts toward peaceful resolution of its disputes with the Turkish government, or to work with it in advocating for legal reforms at the United Nations and in Congress. Just as in *De Jonge*, where the Court found no evidence that tolerating peaceable advocacy of the Communist Party's lawful activities would further criminal syndicalism, or in *Cox v. Louisiana*, where the Court held that peaceable civil rights protests would not undermine the peace and security of Louisiana, so here, there is no reason to believe that plaintiffs' speech will threaten U.S. security. The government and amici dismiss such a determination as a policy disagreement with Congress, but it is not. Rather, it is the Court's duty, in as-applied challenges to laws regulating speech and association, to invalidate the statute as applied if the government cannot meet its constitutional burden of justification.

Protecting plaintiffs' speech will leave the government with fully adequate tools to address threats to our national security. A decision declaring the four challenged provisions invalid as applied to plaintiffs' proposed speech would leave the entirety of Section 2339B available for enforcement against all conduct that is not protected speech, along with a

host of related statutes criminalizing support of terrorist activity. While it insists that plaintiffs' speech must be prohibited, the government has not been able to cite *a single case* in which it has used the statute to prosecute anyone for the kind of speech plaintiffs propose here. The empirical record of use of the statute does not justify the claim of need the government must support to prevail here. *See Citizens United*, slip op. 10 ("First Amendment standards . . . 'must give the benefit of any doubt to protecting rather than stifling speech.'").

CONCLUSION

All four provisions should be held invalid or, alternatively, read to require intent to further terrorist activity, as applied here. The judgment of the court of appeals should be affirmed with respect to the provisions held invalid and reversed with respect to the provisions upheld.

Dated: January 21, 2010

Respectfully submitted,

DAVID D. COLE
Counsel of Record
c/o Georgetown Univ. Law Center
600 New Jersey Ave. NW
Washington, DC 20001
(202) 662-9078

SHAYANA KADIDAL
JULES LOBEL
JOSHUA M. ROSENTHAL
Center for Constitutional Rights
666 Broadway, 7th floor

New York, NY 10012
(212) 614-6438

RICHARD G. TARANTO
Farr & Taranto
1150 18th Street, NW
Washington, DC 20036
(202) 775-0184

CLIFFORD Y. CHEN
Watkins, Bradley & Chen LLP
228 Park Avenue South #14905
New York, NY 10003
(212) 937-4281

CAROL SOBEL
429 Santa Monica Blvd., Suite 550
Santa Monica, CA 90401
(310) 393-3055

PAUL HOFFMAN
Schonbrun, De Simone, Seplow,
Harris and Hoffman LLP
723 Ocean Front Walk
Venice, CA 90291
(310) 396-0731

VISUVANATHAN
RUDRAKUMARAN
875 Avenue of the Americas
New York, NY 10001
(212) 290-2925

Counsel for Respondents (08-1498)
and Cross-Petitioners (09-89)